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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANDERSON COUNTY, TENNESSEE
and
STATE BOARD OF EQUALIZATION OF TENNESSEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal contractor committed fraud upon the court in order to evade taxation in two different taxing jurisdictions by asserting contradictory interpretations of the same federal contract, representing in California that the contract conveyed to it such exclusive possession and control of a government-owned plant that it was in effect a tenant, while withholding this evidence when testifying before state and federal courts in Tennessee that it did not have exclusive possession and control.

2. Whether the United States had an obligation to advise the district court in Tennessee or the defendant of its contractor's evidentiary submissions in California and by its failure to do so participated in the fraud perpetrated on the court by its contractor and received a benefit therefrom.

3. *Is the doctrine enunciated by this Court in Vandenbark v. Owens-Illinois Glass Co.,* 311 U.S. 538, 61 S. Ct. 347, 85 L. Ed. 327 (1941), applicable to parallel proceedings when the decision of the state's highest court is itself controlled by a federal court's interpretation of the property interests conveyed by a federal contract and when the party in the federal court finances and has the contractual right to direct, and does direct, the actions of the party in the parallel proceedings in the state court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Attorney General of the State of Tennessee, on behalf of the State Board of Equalization of Tennessee, and Anderson County, Tennessee, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 10, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A at A-1) is reported at 761 F.2d 1169 (6th Cir., 1985). The opinion of the District Court (Appendix B at A-12) is reported at 575 F. Supp. 574 (E.D. Tenn., 1983). The opinion of the Tennessee Supreme Court (Appendix C at A-20) is reported at 679 S.W.2d 938 (Tenn., 1984). The opinion of the Chancery Court (Appendix D at A-29) is *Union Carbide Corp. v. Alexander,* No.82-431-III (Opinion, Davidson County, Tenn., Ch. Feb. 2, 1983).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 10, 1985. This petition was filed within the period granted by Order of the Court (Appendix E at A–38). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent parts of the Tennessee Code Annotated, Sections 4–5–117, 4–5–322, 67–401, 67–501, 67–601(1), 67–602(6) and 67–831(3) (Supplement 1980), are set forth in Appendix F at A–39. 28 U.S.C. § 1254(1) is set forth in Appendix G at A–56.

STATEMENT OF THE CASE

In this case, Anderson County, Tennessee, levied its general real property tax on a federal contractor's, Union Carbide Corporation, separate taxable interest in a government–owned plant (Y–12) in Oak Ridge, Tennessee. In parallel proceedings, the United States resisted the tax in the federal courts, while Carbide, financed and directed by the United States, resisted the tax before the Tennessee state tax tribunals and the state courts. During the entire time of this litigation, Carbide presented evidence before California taxing authorities, where it sought to diminish its franchise tax liabilities, that was contradictory to its testimony in the Tennessee and federal courts. Neither Carbide nor the United States informed the federal court of Carbide's declarations in California. Carbide successfully diminished its franchise tax liability in California and totally escaped a general real property tax in Tennessee.

A. The Facts

The United States owns 37,185 acres of land in Anderson and Roane Counties, Tennessee, upon which the Government has constructed the Oak Ridge atomic

energy complex. The Oak Ridge complex includes an industrial facility known as the "Y-12 Plant" located in Anderson County, Tennessee. The primary work carried on in the Y-12 plant is the development and production of nuclear weapons components for the United States. However, at the time of this litigation the development and production of nuclear weapons components in the Y-12 plant was not performed by government employees, but by Carbide pursuant to a cost-plus-fixed-fee Government Contract No. W-7405-ENG-26. Carbide first entered into the contract in 1943 and was the contractor for a period of about forty years.

Carbide's contract obligated it to manage, operate and maintain the Oak Ridge plants and facilities in accordance with such directions and instructions not inconsistent with the contract as the Department of Energy [formerly the Atomic Energy Commission] deemed necessary to issue from time to time. In the absence of applicable instructions, Carbide was to use its best judgment, skills and care in all matters pertaining to performance. Carbide was charged with the duty of procuring materials, supplies, equipment and facilities, although the Government retained the right to furnish any of these items. Payment for purchases was to be made with government funds, and title to all property passed directly from the vendor to the United States.

The contract specifically vested care, custody and possession of Y-12 in Carbide, which was responsible for safeguarding and protecting the plant and its equipment. Carbide was liable for loss, destruction, or damage to such property caused by the misconduct of its corporate officers or supervising representatives. The company was required to maintain guard and firefighting forces to protect the property.

Under the contract the United States retained the right to inspect the work and activities of Carbide in the Y-12

plant. The United States also retained the right to terminate at six (6) months notice, while Carbide could terminate on one year's notice.

At the time of this litigation, Carbide employees numbered 7,109 in the Y-12 plant. There were 90 federal employees located in the facility.

Carbide was paid its allowable costs, plus an annual fee. In addition to its fee, Carbide derived valuable benefits from the work it performed under the contract. The contract provided that Carbide could retain a paid-up license to use inventions resulting from its contract work and that the government could grant to Carbide the right to apply for foreign patents in its own name.

Any taxes paid by Carbide were allowable costs, provided that Carbide took such action as the government might direct.

Carbide paid no rent for its use of the Y-12 plant, nor did Carbide have any investment in the Y-12 plant.

In June, 1980, Anderson County imposed its general real property tax on Carbide asserting that Carbide owned a taxable interest in Y-12 separate from the ownership of the government.[1]

B. The Proceedings

State and Federal Proceedings

In this case, there were complex federal and state (Tennessee and California) proceedings. There follows a summary of the proceedings in the state (Tennessee and California) and federal courts:

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[1]The County levied its general real property tax on Carbide pursuant to Tennessee Code Annotated Section 67-401, 67-501, 67-601(1) and 67-602(6) (Supplement 1980) (Appendix F at A-39).

State—California

1. Prior to the time that Anderson County, Tennessee imposed its general real property tax on Carbide and during the entire period of the litigation in the federal and state courts of Tennessee, Carbide, for the purpose of diminishing its franchise tax in California, represented to California taxing authorities that its contract with the United States conveyed to Carbide the exclusive use and possession of Y-12 and that Carbide is in effect a tenant. *Appeal of Union Carbide Corporation,* CCH STATE TAX REPORTER (California ¶ 400-813). (April 5, 1984)

State—Tennessee

1. On June 3, 1980, Anderson County, Tennessee, levied its general real property tax on Carbide's separate taxable interest in the government-owned Y-12 plant conveyed to Carbide by its contract with the United States.

Federal

2. On July 15, 1980, the United States filed an action in the federal district court seeking the invalidation of the tax. The federal district court ordered the parties to pursue their remedies before the Tennessee county and state boards of equalization and permitted either party to return to the district court, if dissatisfied, to ask for appropriate relief. On July 20, 1981, the district court dismissed, without prejudice.

State—Tennessee

3. The United States and Carbide then appealed to the county board which, on September 30, 1980, found Carbide taxable. The United States then formally withdrew from the state proceedings. Carbide, directed and funded by the United States, continued the appeal. Subsequently, the Tennessee Assessment Appeals Commission found Carbide not taxble, but was itself reversed by the Tennessee State Board of Equalization which, on January 8, 1982, found Carbide taxable.

5. On March 8, 1982, Carbide filed a petition for judicial review pursuant to Tennessee Code Annotated § 4-5-117 (Appendix F at A-39) with the Davidson County, Tennessee, Chancery Court of the state board's decision.

Federal

4. On February 12, 1982, the United States reinstated its initial action in the federal district court.

6. On April 15, 1982, the federal district court abstained

State—Tennessee

7. On February 2, 1983, the Davidson County Chancery Court affirmed the state board's opinion and found Carbide owned an interest in real property of Y-12 separate from the ownership interest of the government. *Union Carbide Corp. v. Alexander,* No. 82-431-III (Davidson County Ch., Feb. 2, 1983). Appendix D at A-29.

Federal

and dismissed. *United States v. Anderson County, Tennessee,* 547 F. Supp. 18 (E.D. Tenn., 1982) The district court ruled "[t]he issues raised by Union Carbide are important ones and relate only to state law." *Id.* at 19.

8. On appeal by the United States, the Sixth Circuit on April 20, 1983, reversed the federal district court's abstention and dismissal and remanded the case to federal district court. *United States of America v. Anderson County, Tennessee, et al.,* 705 F.2d 184 (6th Cir., 1983) (*cert. denied,* 104 S. Ct. 548 (1983)). The appeals court stated there were no unsettled questions of state law holding that Tennessee statutes are clear in imposing an *ad valorem* tax on real property interests, but that the unsettled question is whether Carbide's contract with the United States conveys to Carbide "*any* real property interest" and that the "inter-

State—Tennessee

Federal

pretation of a contract wherein the United States is a party is a *federal* issue" (emphasis in original), *id.* at 187.

9. On November 9, 1983, the district court on remand granted the government's motion for summary judgment, ruled that under the contract "Union Carbide does not have exclusive possession of Y-12," but only the right to use, enter and leave and that such a right is "a mere license" which "creates no estate in land and generally is not considered an interest in land." *United States v. Anderson County,* 575 F. Supp. 574, 577-578 (E.D. Tenn., 1983). [Appendix B at A-12.]

10. On December 22, 1983, the Tennessee Court of Appeals concluded (1) it was bound by the district court's ruling that its contract with the United States conveyed to Carbide the right to use, leave and enter Y-12 and (2) the court ruled that, under Tennessee law, such an interest, was not taxable. *Union Carbide v. Alexander,* slip at 9 (Tenn. Ct. App. Dec. 22, 1983)

11. On November 5, 1984 the Tennessee Supreme Court aff'd *Union Carbide v. Alexander,* 679 S.W.2d 938. (Tenn., 1984). [Appendix C at A-20.]

12. On May 10, 1985, the court of appeals affirmed stating its decision was controlled by the Tennessee Supreme Court's ruling and stated "we expressly base our affirmance on the decision of that court."

State—Tennessee	Federal
	United States v. Anderson County, Tennessee, et al., 761 F.2d 1169, 1175 (6th Cir. 1985). [Appendix A at A-1.]

C. The Courts' and Taxing Authorities' Conclusions on the Nature of Carbide's Use of the Y-12 Plant

Anderson County maintains that the central issue in this litigation is whether Carbide's right to use, enter and leave Y-12 was sufficiently exclusive to give it a separate taxable interest. Following is an analytical discussion of the various court rulings on this critical issue:

On February 2, 1983, the Davidson County Chancery Court as an appellate court affirmed the state board's ruling that Carbide owned a taxable interest in the Y-12 plant separate from the ownership interest of the government.[2] *Union Carbide Corp. v. Alexander,* No. 83-431-III (Davidson County, Ch., February 2, 1983), Appendix D at A-29. The Chancellor in reaching his conclusion held that Carbide has the right to use Y-12 and the right to enter and leave it and that "[a]lthough Carbide uses and possesses the plant for the government, it does so largely to the exclusion of the government." Appendix D at A-32. The "contract itself expressly gives Carbide

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[2]Under the Tennessee Uniform Administrative Procedures Act, TENN. CODE ANN. § 4-5-322 (Appendix F at A-39), the Chancery Court sits as an appellate tribunal. Moreover, the Chancery Court in affirming the State Board of Equalization, agreed with the highest state agency dealing with property taxation and having expertise in the application of Tennessee law to interests in real property, that State agency having been charged with the principal responsibility "to effect the equalization of assessments, in any taxing jurisdiction within the state. . . ." Tennessee Code Annotated § 67-831(a)(3) (Appendix F at A-39).

possession of the plant." Appendix D at A-33. Further, "[t]he government's role in the plant's operation is miniscule." Appendix D at A-31. These factors led the Chancellor to conclude that Carbide has a sufficient degree of exclusivity to have a taxable interest in Y-12 separate from that of the government's fee ownership.

However, nine months later on November 9, 1983, the district court granted the United States' motion for summary judgment that the County's tax was invalid. *United States v. Anderson County, Tennessee,* 575 F. Supp. 574 (E.D. Tenn., 1983) (Appendix B at A-12). The district court in finding that Carbide had no taxable interest in Y-12 stated:

> Although Union Carbide has the right to enter, leave and use Y-12, it does not have a leasehold interest in Y-12. Generally, during the existence of a lease, the tenant is the owner of the premises and entitled to exclusive possession. 51 C.J.S. *Landlord and Tenant,* § 202(6). Union Carbide does not have exclusive possession of Y-12.

Id. at 577 (Appendix B at A-17).

The United States supported its motion for summary judgment by two affidavits, one by Mr. Joe La Grone, the United States Manager at Y-12, and the second by Mr. Roger Hibbs, President, Carbide Nuclear Division, who had responsibility for the operation of the Y-12 plant.

In paragraph 9 of his affidavit, Mr. La Grone, said:

> Nor does it [the contract] purport to grant Carbide the exclusive use and occupancy of the Y-12 Plant. By virtue of such contract, Carbide has only the right of access to the Y-12 Plant to perform its duties under the contract.

Appendix H at A-57.

Paragraph 4 of Mr. Hibbs' affidavit stated:

> Union Carbide Corporation does not operate, manage and maintain the Y-12 Plant or any of the other government facilities under the contract to the exclusion, in any degree, of the Government nor does it construe Contract No. W-7405-ENG-26 as giving Union Carbide Corporation the right to do so.

Appendix I at A-59.

Based on its analysis of Carbide's contract and the affidavits filed in support of the United States' motion for summary judgment, the district court found that Carbide's right to enter, leave and use Y-12 (without exclusive possession) is not a leasehold interest but "a mere license" which "creates no estate in land and is generally not considered an interest in land" and as a result the general real property tax was invalid. 575 F. Supp. at 577-578 (Appendix B at A-19).

In reaching its decision, that district court was unaware that prior to, and all during the period of the litigation in Tennessee, both in the federal and state courts, Carbide was seeking to diminish its franchise taxes in proceedings before the California taxing authorities. During these proceedings, Carbide's manager of state income taxes, Mr. L. R. Dowden, represented on July 17, 1980:

> Since the Taxpayer, UNION CARBIDE CORPORATION, is operating the government facilities under a cost-plus operation the Corporation in effect is a tenant of the property and while not paying an agreed rental, *it has the exclusive use and possession of the property.*

Emphasis added, Appendix J at A-62.

Similarly, in a letter dated May 22, 1981, responding to specific questions from the franchise tax board regarding the nature of the operation at Y-12, Mr. Dowden represented:

> The nature and extent of government control is exercised by inspection and audit of books of account and records kept by us. . . . The United States Atomic Energy Commission (now United States Department of Energy), has the right to inspect the work and activities of Union Carbide at these installations. *Our Nuclear Division management located at Oak Ridge, has complete control of day to day operations and makes all decisions to carry out the terms of the contract.*

Emphasis added, Appendix J at A-67.

Then Carbide in the same letter explained to the franchise tax board that it viewed the Oak Ridge complex as its own:

> [O]ur operation of the nuclear energy facilities are a necessary and integral part of our business operations.
>
> * * *
>
> In essence, we treat the facilities, materials and equipment as though they were our own.

Appendix J at A-69.

Based on these and other similar representations by Union Carbide, the California State Board of Equalization on April 5, 1984, concluded that Carbide did have "exclusive use of the facilities, materials and equipment" of Y-12 and that the Franchise Tax Board "must include the value of the government-owned facilities [at Oak Ridge, including Y-12] in the denominator of the property factor." *Appeal of Union Carbide Corporation,* CCH STATE TAX REPORTER (California ¶ 400-813) (1984), Appendix K at A-73 and A-79.

The Tennessee Court of Appeals, also unaware of Carbide's California declarations, concluded it was bound by the district court's interpretation that the contract conveyed a mere license to Carbide and ruled that a license

was not taxable. *Union Carbide Corp. v. Alexander,* slip. op. at 9 (Tenn. Ct. App., Dec. 22, 1983). The Tennessee Supreme Court on December 5, 1984, affirmed in *Union Carbide v. Alexander,* 679 S.W.2d 938 (Tenn., 1984) (Appendix C at A-20). It noted:

> The Tennessee Court of Appeals concluded that it was bound by the district court's finding that the contract granted a license to Union Carbide, since the interpretation of a contract to which the United States is a party is a federal question, citing *United States v. Allegheny County,* 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209 (1944). However, the Court of Appeals recognized that it was not bound by the District Court's finding that the interest of Union Carbide was not taxable, since state courts of Tennessee are the interpreters of Tennessee statutes. Nevertheless, the Court of Appeals did agree with the District Court that the interest was not taxable.

Id. at 940 (Appendix C at A-23).

In its brief of August 30, 1984, to the Tennessee Supreme Court, Carbide admitted for the first time in four years of proceedings in Tennessee that in California and prior to its resistance of taxation in Tennessee, it had contended it had "exclusive use of the facilities, materials, and equipment of Y-12" (Appendix L at A-81). In its opinion, the Tennessee Supreme Court made no comment on this admission. As pointed out earlier, it deemed itself bound by the district court's interpretation of the contract.

On May 10, 1985, the Court of Appeals for the Sixth Circuit affirmed the district court's decision that Carbide did not have a taxable interest in Y-12. *United States v. Anderson County, Tennessee,* 761 F.2d 1169 (6th Cir. 1985). The court of appeals stated:

> It is an established principle of law that a reviewing court can sustain the judgment of a

> lower court on any ground that finds support in the record. [Cites omitted.] Given that this court has available to it the controlling decision of the Tennessee Supreme Court on the issues of Tennessee law raised by this appeal, we expressly base our affirmance on the decision of that court.

Id. at 1175 (Appendix A at A-11).

REASONS THE WRIT SHOULD BE GRANTED

The ultimate issue in this case is whether a federal contractor, the Union Carbide Corporation, that possessed and used a United States government weapons plant located in Tennessee under a cost-plus contract with the United States was subject to state taxation of its separate real property interest in the plant. In the course of complex parallel state and federal proceedings, it emerged that the factual question critical to a final determination of this issue was whether Carbide had *exclusive possession and control* of the plant. If it did not, then the company was a mere licensee of the government with no taxable real property interest in the plant. If it did, however, then Carbide could be held taxable under Tennessee statutes that impose a tax on leaseholds when the underlying fee is exempt from taxation.

Prior to the imposition of the general real property tax on Carbide in Tennessee and prior to the time the United States was submitting to the district court affidavits by its own and Carbide officials stating that Carbide did *not* have exclusive possession and control of the government plant, Carbide was representing in unrelated state tax proceedings in California that it *did* have exclusive possession and control of the same Tennessee plant. Moreover, in parallel proceedings before the Tennessee state courts, Carbide, at the direction and with the funding of the United States, was testifying that it *did not* have exclusive possession and control of the government-owned plant. It is petitioner's position that the motivation

for Carbide's inconsistent averments was the evasion of state taxes.

Because the legal incidence of the disputed tax was on Carbide, Carbide was the real party of interest in the federal proceedings below. Clearly, Carbide was aware of its own pleadings in California, at the time it submitted the affidavits to the District Court in the present case. Its California pleadings constituted admissions on the determinative factual question of this case and the company's failure to bring these declarations to the district court's attention constituted a fraud in the court. Petitioners do not know at what time the United States became aware of Carbide's inconsistent pleadings in California. If the United States knew, or reasonably should have known, of its contractor's California pleadings at the time it presented the case to the district court, then it was obligated to advise the court and the petitioners of those pleadings and by its failure to do so participated in the fraud perpetrated by its contractor and benefitted therefrom.

On the basis of the affidavits before it, the district court held that Carbide did *not* have exclusive possession and control of the government plant and that, therefore, Carbide was a mere licensee of the government. Although the district court had initially abstained, the Court of Appeals of the Sixth Circuit reversed, holding that interpretation of a contract to which the United States is a party is a federal issue. Accordingly, in the parallel state proceedings, the Tennessee Court of Appeals declared itself bound by the district court's determination of the interest in the government-owned plant contractually conveyed to Carbide and found such an interest not taxable under Tennessee law. The Tennessee Supreme Court affirmed. The Court of Appeals for the Sixth Circuit thereupon ruled that Carbide's declarations in California were rendered immaterial. It took this action despite the fact that the Tennessee courts had determined themselves to be bound by the district court's ruling on the

nature of the interest conveyed. It would appear that neither the Tennessee Court of Appeals nor the Tennessee Supreme Court felt free to consider the critical evidence withheld from the United States District Court.

Petitioners now seek this Court's review. Upon granting of a writ of certiorari, petitioners will request that this Court remand the case to the district court for reconsideration in light of the evidence fraudulently withheld from it. The federal district court should consider the evidence of Carbide's California representations and should be instructed that it is not bound by the state court's judgment based on the federal district court's prior interpretation of the federal contract.

If this case is remanded to the district court and that court, with the new evidence from California, finds Carbide does have exclusive possession of the Y-12 facility and is therefore subject to taxation, petitioners will move to set aside the final judgment in the state proceeding pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure.

ARGUMENT

I.

Carbide's declarations before the California taxing authorities, its subsequent contradictory testimony in the federal district court, and its failure to advise the federal court of its California representations constitute fraud upon the federal district court.

The United States filed two affidavits in support of its motion for summary judgment in the District Court in Eastern Tennessee, where it sought to have the general real

property tax imposed on its contractor declared invalid. One affidavit was by a United States' employee at Oak Ridge and the other by Mr. Roger F. Hibbs, Carbide's official responsible for its operations at Oak Ridge. Both affidavits addressed themselves, among other things, to the specific nature of Carbide's use and possession of the Y-12 plant. The government's affidavit stated in paragraph 9 that:

> Nor does it [the contract] purport to grant Carbide the exclusive use and occupancy of the Y-12 Plant. By virtue of such contract, Carbide has only the right of access to the Y-12 Plant to perform its duties under the contract.

Appendix H at A-57.

Paragraph 4 of Mr. Hibbs' affidavit stated:

> Union Carbide Corporation does not operate, manage and maintain the Y-12 Plant or any of the other government facilities under the contract to the exclusion, in any degree, of the Government nor does it construe Contract No. W-7405-ENG-26 as giving Union Carbide Corporation the right to do so.

Appendix I at A-59.

The petitioner maintains that these assertions of exclusivity go to the very heart of whether Carbide is subject to the County's general real property tax and it is clear that the district court did also. In concluding that Carbide's cost-plus contract with the government did not convey a leasehold (and taxable interest) to Carbide the district court found that "although Union Carbide has the right to enter, leave and use Y-12, it does not have a leasehold interest in Y-12. . . . Union Carbide does not have exclusive possession of Y-12." 575 F. Supp. at 577 (Appendix B at A-17).

While Carbide was testifying in the district court that its

contract with the government for the operation of the Y-12 plant did *not* give it exclusive use and control of that property, Carbide was, and had been prior to the government's suit in the district court, representing to the California State Board of Equalization (and the California State Board ultimately found) that that same contract *did* give Carbide exclusive use and control of the same property, to the extent that Carbide "in effect [was] a tenant of the property." Appendix J at A-62. The issue of Carbide's exclusive use and control of Y-12 is so central to this case that had the district court found that Carbide had exclusive use and control of Y-12 under the contract or that Carbide was in effect a tenant of Y-12, the district court would clearly have entered judgment for the petitioners. But neither the United States nor Carbide informed the district court and the district court was totally unaware of Carbide's evidentiary submissions in California and granted the United States' motion for summary judgment.

The petitioners maintain that the facts in this case are sufficient to constitute fraud on the part of Carbide upon the court by falling within the range of conduct for such fraud as proscribed by this Court in *Hazel-Atlas Co. v. Hartford,* 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1943).

In *Hazel-Atlas,* Hartford had defrauded the patent office by helping along its application for a patent through use of an article written by its officials and attorneys under the name of an ostensibly disinterested expert and later in its action through its use of the article. Here Carbide, acting under the government's direction and funding, furthered the cause of the United States in the district court, where Carbide was the taxpayer and the real party of interest, by filing an affidavit in support of the government's motion for summary judgment that

contradicted its representations in another jurisdiction.[3]

The petitioners maintain that Carbide's motivation for its inconsistent averments was the evasion of state taxes, in which thus far they have succeeded.

It is pointed out that Carbide in oral argument on October 1, 1984, before the Tennessee Supreme Court stated that Carbide would decide by December 1, 1984, what to do with the record as to Carbide's inconsistent assertions in California. But once the Tennessee Supreme Court filed its decision on November 5, 1984, Carbide quickly changed its mind. In a letter dated December 3, 1984 (Appendix N at A-86), to the Tennessee Supreme Court, Carbide stated:

> In the course of oral argument, reference was made . . . to a franchise tax proceeding before the California State Board of Equalization involving Union Carbide. (*Appeal of Union Carbide Corporation,* Calif. Tax Reporter CCH) ¶ 400-813). Responding to that reference, I informed the Court of what Union Carbide was planning to do with respect to the record in the California proceedings and that the Court would be informed by December 1, 1984, of the action taken by Union Carbide.

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[3]The contract between the United States and Carbide provides that the taxes assessed and costs of any litigation will be allowable costs if the contractor follows the directions of the United States with regard to litigation concerning the taxes. See Article XXIV, *State and Local Taxes* and Article XVIII, *Litigation and Claims,* Appendix M at A-83.

> Since a decision has now been rendered by this Court and the issues resolved . . . it seems that any further discussion or examination of the California proceeding would be inappropriate in the Tennessee Supreme Court, and for this and other related reasons, no action has been taken by Union Carbide at this time. If the Court still has any interest in what acion, if any, is taken by Union Carbide with respect to the California proceeding, I would appreciate hearing from you.

Furthermore, although the legal incidence of the general real property tax imposed by Anderson County fell on Carbide, the government had assumed the economic burden of that tax. However, Carbide's franchise taxes are paid from the Corporation's own funds.

In *Hazel-Atlas,* this Court stated:

> [T]ampering with the administration of justice in the matter indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society . . . . The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

322 U.S. at 246, 64 S. Ct. at 1001.

In *Hazel-Atlas,* this court made its decision as the "matter does not concern only private parties. There are issues of great moment to the public in a patent suit." 322 U.S. at 246, 64 S. Ct. at 1001. The same public interest is present in the case now before the courts because those who enjoy the benefits of government should share in the

burdens of such government by paying their fair share of the taxes.

Moreover, Carbide's conduct in these parallel proceedings did not involve a single isolated instance of nondisclosure, withholding of information or misrepresentation, but a number of such acts representing a consistent pattern. Carbide, prior to Anderson County levying its real property tax on the Corporation, was already involved in California tax proceedings to diminish its California taxes, offering detailed evidence that under its cost-plus contract in Oak Ridge it was in effect a tenant at the Y-12 plant and had exclusive possession and control of the plant and regarded the facility as one of its own. When the United States in the District Court, where Carbide was the real party of interest and was contractually bound to follow the government's direction, moved for summary judgment, Carbide supported that motion with an affidavit that it did not have exclusive use of Y-12 in any degree. Directed and funded by the United States to oppose the County's tax, Carbide asserted in the state courts that its cost-plus contract merely gave it access to use Y-12 to perform its contract obligation and it did not enjoy the exclusive use of Y-12. At no time did Carbide advise the federal court (nor did the United States) of its prior evidentiary submissions in California nor did it advise the state courts, until four years after the tax had been imposed and the Tennessee Supreme Court of Appeals had considered itself bound by the district court's determination that Carbide did not have exclusive possession of Y-12. At the oral argument before the Tennessee Supreme Court, Carbide stated it would review the record and determine by December 1, 1984, if it would change its California representations. But once the Tennessee Supreme Court ruled, Carbide withdrew that offer.

Whatever the refinements of the arguments, it is a fact that Carbide (1) did decrease its franchise taxes in California because the California State Board of Equali-

zation concluded Carbide did have "exclusive use of the facilities, materials and equipment" of Y-12 and (2) escaped Tennessee property taxes because the district court found it did not have "exclusive possession of Y-12." This Court simply cannot condone such a course of conduct within the federal system on an issue of such "great moment" to the public as taxation. This Court should exercise its supervisory powers to prevent this injustice.

II.

The United States had an obligation to advise the Federal Courts and the petitioner of its contractor's contradictory declarations before the California taxing authorities, particularly when the United States has assumed the economic burden of paying the contractor's tax in Tennessee, and directed and funded Carbide's litigation in the state courts, and the failure of the United States to do so had the effect of its participation in the fraud perpetrated by its contractor and to receive benefits therefrom.

The petitioners do not know if the United States was aware of its contractor's declarations in California when it filed its complaint in the district court in July, 1980, and, if not, when it first learned of Carbide's declarations in California. The petitioners believe that the United States reasonably should have known of its contractor's, of almost forty years, interpretation of the contract. This is particularly so in this case because Carbide in its action before the federal and state courts was funded and directed by the United States. Appendix M at A-83. However, whenever the United States first learned of Carbide's declarations, which is yet to be disclosed, the petitioners believe the government had, at that point, an obligation to advise the court, before *continuing* the prosecution of its case.

The United States could not reasonably have expected, even under the most extreme view of the adversarial system, that the petitioners would have the knowledge of Carbide's declarations in California. Thus, the District Court was deprived of the opportunity to determine the effect of Carbide's contradictory evidentiary submissions regarding the same contract. Further, Carbide's evidentiary submissions in California totally support the petitioners' position before the federal and state courts. However, the United States did not advise the court, instead *continued* to argue that the contract did not give Carbide exclusive possession, but only a right of access to perform its contract, supporting its position by evidence submitted by Carbide. As a result, the district court made its decision without the knowledge that Carbide had asserted an interpretation in California of its contract that would clearly have led the district judge to hold that Carbide, pursuant to its contract, enjoyed such exclusive possession and control of Y-12 as to make valid the general property tax, which the district court had declared invalid.

This Court cannot permit a federal contractor to make contradictory interpretations of its federal contract and cannot permit the United States to benefit from such contradictory interpretations.

III.

The presentation of evidence by Carbide before the California taxing authorities, where Carbide sought to diminish its franchise tax, was admissible against the United States in the lawsuit before the United States District Court in Eastern Tennessee, where the United States sought to invalidate a Tennessee general real property tax imposed on its contractor, and those declarations are not rendered immaterial by a subsequent decision in a

parallel proceeding of the Tennessee Supreme Court which considered itself bound by the District Court's interpretation of its federal contract.

In this case, Anderson County imposed its general real property tax on Carbide, for Carbide's contract with the United States conveyed to Carbide an interest in the real property of the government-owned Y-12 facility at Oak Ridge separate from the government's fee ownership. If the tax is valid, the legal incidence falls on Carbide's "private use" of government property for its "own profit and gain." *United States v. Boyd,* 378 U.S. 39, 43, 12 L. Ed.713, 84 S. Ct. 1518 (1964). An assumption of the economic burden of the tax by the United States does not shift the legal incidence of the tax to the United States. 378 U.S. at 44. In *United States v. New Mexico,* 624 F.2d 111 (10th Cir. 1980), *aff'd,* 455 U.S. 720, 71 L. Ed. 580, 102 S. Ct. 1373 (1982)), where New Mexico sought to impose its gross receipts tax and compensatory tax on three Energy Research and Development Administration (formerly the Atomic Energy Commission) contractors, the district court held the United States to be the real party of interest, but the Tenth Circuit reversed. 624 F.2d at 121. Therefore, the real party of interest in the lawsuit brought by the United States in the district court for Eastern Tennessee is Carbide, who is legally responsible for the tax, and the United States is the nominal party having the contractual power to direct and control the actions of Carbide.

As Carbide is the real party of interest in the proceedings in the district court, since its declarations in the California tax proceedings are against Carbide's interest in Tennessee, they are admissible against the nominal party, the United States, who in the district court in Eastern Tennessee is representing the real party's interest. *Krebs Pigment & Chemical Co. v. Sheridan,* 79 F.2d 479 (3d Cir. 1935). *See* 4 Wigmore, *Evidence,* § 1076 (Chadbourn Rev.

1972), for a discussion and *see also Mayo v. Owen, et al.*, 67 S.E.2d 709 (1951), and *Hampton v. Roberson*, 163 So. 644 (1935).

The lower court held these declarations immaterial, citing this Court's opinion in *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S. Ct. 347, 85 L. Ed. 327 (1941), for the proposition that "until such time as a case is no longer *sub judice*, the duty rests upon the federal courts to apply state law . . . in accordance with the then controlling decision of the highest state court."

This Court in *Vandenbark* in discussing *Erie RR Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), noted that in *Erie* "there was no necessity there for discussing at which step in the cause the state law would be formally determined." 311 U.S. at 540. This Court then ruled that a court of appeals, upon appeal from a judgment of a district court, must apply the state law declared by the highest court of the state as of the time the appeal is disposed of, not at the time when judgment was entered, and where the decision of the state court relied upon by the district court has since been reversed or overruled, the appellate court should reverse the judgment of the district court. This case, however, raises a further question regarding the application of the *Erie Vandenbark* doctrines.

Unlike *Vandenbark*, the case before this Court involves parallel proceedings in the federal court brought by the United States and in the state courts brought by Carbide, at the direction and funding of the United States. The case in the federal and state courts concerned the same real property tax levied on Carbide. Initially, the federal district court abstained and dismissed the United States' complaint. *United States v. Anderson County, Tennessee et al.*, 547 F. Supp. 18 (1982). The Sixth Circuit reversed. It stated that there were no unsettled questions of Tennessee law as the relevant statutes were "clear in imposing an *ad valorem* tax on real property interests and

need no judicial construction," that the unsettled question before the district court was "whether the contractual relationship between Union Carbide and the United States conveyed to Union Carbide *any* real property interest in the Y-12 plant" and that the "interpretation of a contract wherein the United States is a party is a *federal issue.*" 705 F.2d at 187 (emphasis in original) (Appendix A at A-5).

When the case returned to the district court, the Tennessee State Board of Equalization had already determined that Carbide did own a taxable real property in Tennessee and on Carbide's petition for judicial review the Chancery Court had affirmed (Appendix D at A-29). The Chancellor ruled that Carbide had the right to use, enter and leave Y-12 and that it also had a sufficient degree of exclusivity in its possession of Y-12 to own an interest in the real property at Y-12 separate from the ownership interest of the government.

On remand the district court ignored the Chancellor's ruling and concluded, after its own analysis of the contract and affidavits, the interest conveyed to Carbide to be "the right to enter, leave and use Y-12" but said that "Union Carbide does not have exclusive possession of Y-12." 575 F. Supp. at 577 (Appendix B at 17). Without exclusive possession Carbide's interest is "a mere license" and "a license creates no estate in land and generally is not considered an interest in land. 53 C.J.S. *Licenses* § 79 (1948), 25 Am. Jur. *Easements and Licenses,* § 128 (1966)." 575 F. Supp. at 577 (Appendix B at A-19). However, the district court's decision was fundamentally flawed for the court did not know that Carbide, in California, had represented (and subsequently the California State Board of Equalization found) that it had exclusive possession of Y-12 and was in effect a tenant. Rather, Carbide testified before the district court that it did not have exclusive possession "in any degree" and the government had filed a similar affidavit (Appendix I at A-58). Because the district court's decision was binding on the state courts all the

subsequent decisions were drawn from the same poisoned well.

In those subsequent state proceedings, the Tennessee Court of Appeals concluded that it was bound by the district court's interpretation of what was conveyed to Carbide by the contract and ruled that the interest was not taxable under Tennessee law and reversed the Chancery Court. *Union Carbide Corp. v. Alexander,* slip op. at 9 (Tenn. Ct. App., Dec. 22, 1983). *Aff'd* 679 S.W.2d 938 (Tenn. 1984).

The Court of Appeals for the Sixth Circuit then based its affirmance on the Tennessee Supreme Court's decision, ignoring the fact that the district court's ruling, which was tainted by new disclosures of material facts, controlled the Tennessee Supreme Court:

> It is an established principle of law that a reviewing court can sustain the judgment of a lower court on any ground that finds support in the record. [Citation omitted.] Given that this Court has available to it the controlling decision of the Tennessee law raised by this appeal, we expressly base our affirmance on the decision of that court.

761 F.2d 1173–1174 (Appendix A at A–11).

The petitioner's position is that this case does not fall within the *Vandenbark* doctrine because (1) the district court reached its own conclusion and did not follow the *Erie* doctrine and (2) unlike *Vandenbark,* here the state court's rulings in parallel proceedings were grounded on the federal court's decision, which was made without crucial information that had been fraudulently withheld from it. Further, here the party, United States, in the federal courts financed and had the contractual right to direct and *did* direct the actions of Carbide in the state and federal courts. The court of appeals should not have applied the *Vandenbark* doctrine to this case.

The lower courts need the guidance of this Court as to whether the *Vandenbark* doctrine applies in cases of parallel proceedings where the parties and the issues in the state and federal courts are identical and one party controls and directs the proceedings in both the federal and state courts.

IV.

The Tennessee Rules of Civil Procedure permit the setting aside of the Tennessee Supreme Court's decision ruling that Carbide is not taxable.

If this case is subsequently remanded to the district court and that court, with the new evidence from California, finds Carbide does have exclusive possession of the Y-12 facility and is therefore subject to taxation, petitioners will move to set aside the final judgment in the state proceeding pursuant to Tennessee Rule of Civil Procedure 60.02. (Appendix O at A-88.) Rule 60.02 allows for relief from final judgments where, among other things, an adverse party has been guilty of fraud, misrepresentation or other misconduct. This rule further provides for relief for "any other reason justifying relief from the operation of the judgment." The developments in this case justify resort to Rule 60.02 and would be grounds for reopening the Tennessee proceedings and holding Carbide subject to the taxes on real property in Tennessee.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and the opinion of the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Petition for Writ of Certiorari and Appendix thereto was mailed, postage prepaid, to The Solicitor General, Department of Justice, Washington, DC 20530, this 22nd day of August, 1985.

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